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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1221

21st PHOENIX CORPORATION (Formerly known as Hanson Development Company, a Delaware Corporation) and HANSON DEVELOPMENT COMPANY, A New Jersey Corporation,

Petitioners,

vs.

JOHN E. ENGLISH and FRANCIS DORENBACH, as Personal Representatives of the Estate of Mary E. English, Deceased,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1221

21st PHOENIX CORPORATION (formerly known as Hanson Development Company, a Delaware Corporation) and HANSON DEVELOPMENT COMPANY, a New Jersey Corporation,

Petitioners,

against

JOHN E. ENGLISH and FRANCIS DORENBACH, as Personal Representatives of the Estate of Mary E. English, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners petition for a Writ of Certiorari from the denial of a timely suggestion and petition for rehearing en banc entered in the United States Court of Appeals for the Eighth Circuit on the 12th day of February, 1979. On the 10th day of January, 1979, the United States Court of Appeals affirmed the Order of the United States District Court for the District of Nebraska (Hon. Warren K. Urbom, Chief Judge) and Judgment against Defendants entered on January 16, 1978, in which the District Court determined that it had personal jurisdiction over defendants, by way of sanctions pursuant to *Rule* 37(b)(2)(C) for failure to make discovery.

The Orders of the District Court for the District of Nebraska are reproduced in Appendices A and B herein. The Court of Appeals opinion was reported and is reproduced in Appendix B herein. That Court did not write an opinion on its denial of the suggestion and petition for a rehearing en banc. The order denying the suggestion and petition for a rehearing en banc is reproduced in Appendix C herein.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 10, 1979. A timely suggestion and petition for rehearing en banc was filed and denied by Order entered February 12, 1979.

The jurisdiction of this Court to review the judgment of affirmance by certiorari is conferred by 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. In light of the constitutional limitations on the power of the courts to impose *Rule* 37 sanctions, particularly in the absence of any hearing on factual questions, did the District Court have the authority to declare that it possessed *in personam* jurisdiction of petitioners and render default judgment as a sanction for purported failure to make discovery?

RULE INVOLVED

Federal Rule of Civil Procedure 37(b) provides as follows:

(b) FAILURE TO COMPLY WITH ORDER.

(1) SANCTIONS BY COURT IN DISTRICT WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under *Rule* 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or *Rule* 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under *Rule* 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an aware of expenses unjust.

STATEMENT OF THE CASE

Respondents became owners, on August 20, 1974, subject to a mortgage of $3,200,000.00 and a 99-year ground lease, of the Grand Island Mall Shopping Center, Grand Island, Nebraska. On that same day, the lessor's interest in the ground lease was assigned to them.

The ground lessee, S & H Shopping Centers, Inc., defaulted thereunder and The Hanson Development Company, Delaware, (hereafter "Delaware") and Hanson Development Company, New Jersey, (hereafter "New Jersey") were sued upon a purported guaranty thereof. Default judgment in the sum of $593,802.00 was entered against S & H Shopping Centers, Inc., the ground lessee (which entity filed no answer to the complaint).

A critical issue in the District Court litigation raised by petitioners was the defense that the District Court in Nebraska had no in personam jurisdiction over New Jersey or Delaware.

The District Court imposed *Rule* 37 sanctions by entering a default judgment and determining that it had *in personam* jurisdiction over both corporate entities by reason of claimed disobedience of the Court's orders for discovery in that defendants failed to answer timely certain interrogatories.

The consequence of the foregoing finding was the entry of a judgment by default against Delaware in the sum of $670,000.00.

This order dated December 27, 1977, was entered by way of Sanctions pursuant to *Rule* 37 as a matter of law (Appendix D) without any factual hearings, thus precluding petitioners from adducing any proofs whatsoever regarding the absence of wilfulness or bad faith in respect of the alleged disobedience of the pertinent discovery order or as to the lack of jurisdiction over them. With respect to the latter, the District Court recognized that it had no precedent for the appropriation of in personam jurisdiction through a discovery sanction and was leaving it to the appellate court to state whether this harsh ruling was correct (Appendix D). Hence, this is a case of first impression and it is no answer without a hearing to develop proof, to say as did the Court of Appeals, that a "court has jurisdiction to determine jurisdiction" (Appendix B, footnote 5). Rather, the issue here is—does a court acquire jurisdiction by imposing punishment in the form of a *Rule* 37 sanction order and without any hearing on the facts establishing jurisdiction?

A. *The District Court lacked the authority to declare that it possessed in personam jurisdiction of defendants and to render default judgment, by way of imposition of sanctions pursuant to Rule 37, for failure to make discovery*

While the District Court may, pursuant to FRCP 37 (b)(2)(C), *inter alia*, render a judgment by default against a party disobeying an order for discovery, the Supreme Court has held that such a harsh sanction cannot be applied when the offending party's noncompliance is as a result of an inability to comply. Thus, there must be demonstrated an element of wilfullness or conscious disregard of the order compelling discovery. 4A Moore's Federal Practice §37.03 [2.-5]

Indeed, there are well-settled limitations upon the harshest of sanctions which may be imposed under Rule 37.

The Court of Appeals, Eighth Circuit, has held that

> Fed. R. Civ. P. 37(a) and (b) provide broad discretion to the trial court to impose sanctions for failure to comply with the court's order. Yet, as has been often noted, the rule requires the court to enter "such orders in regard to the failure as are just." The various sanctions under Rule 37(b)(2)(A-E) allow the court, inter alia, to treat such failure as contempt of court, to require the payment of reasonable attorney fees, to stay proceedings until the order is obeyed, to require admissions, to allow designated evidence without further dispute, to strike pleadings, and to enter a dismissal or judgment by default. It can readily be perceived that the latter sanction is most severe and harsh. The Supreme Court and this court have strongly indicated that the harsh remedies of dismissal and default should only be used when the "failure to comply has been due to . . . willfulness, bad faith, or any fault of petitioner." Societe Internationale v. Rogers, 357 U.S. 197, 212 78 S. Ct. 1087, 1096, 2 L.Ed. 2d 1255 (1958); and General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1211 (8th Cir. 1973). As Judge Van Oosterhout stated, "[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court." Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 996 (8th Cir. 1975).

Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977).

In the foregoing case, plaintiff had been delayed in answering Interrogatories, partially because a fire had destroyed some records. The importance of the holding, however, is that the District Court dismissed plaintiff's complaint without a hearing, with the result that the Court of Appeals held that the real error inhered in the failure of the District Court to hold a hearing, prior to dismissal of the complaint, on the critical issues of whether wilfullness or bad faith was involved in the plaintiff's non-compliance with the order for discovery.

> These cases reflect the proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits. McCargo v. Hedrick, 545, F.2d 393, 396 (4th Cir. 1976); and Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974). This balance recognizes that a trial judge should have wide latitude in controlling pretrial discovery orders and should seek compliance with his orders. But this balance also recognizes that in our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied. Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorneys fees or even an attorney's citation for contempt would be a more just and effective sanction. Dismissal and entry of a de-

> fault judgment should be the rare judicial act. When noncompliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the court's order. On remand the district court is free to investigate the imposition, if deemed necessary, of less extreme sanctions against plaintiff or his attorney.

Id. at 772-773.

In *Fox v. Studebaker-Worthington, Inc., supra* at 993, the Eighth Circuit examined the record below and the Court stated its satisfaction that the noncompliance of the offending party constituted "fault" wilfullness or bad faith." *Cf. Link v. Wabash R. Co.*, 370 U.S. 626, 633-634, 8 L.Ed. 2d 734, 82 S. Ct. 1386 (1962); *National Hockey League et al. v. Metropolitan Hockey Club, Inc., et al.*, 427 U.S. 639, 642-643; 49 L.Ed.2d 747, 96 S. Ct. 2778 (1976), (which mandate consideration of the full record by the District Court in conjunction with making the determination of whether to dismiss for failure to comply with discovery orders).

B. *Petitioners were deprived of due process of law by reason of the District Court's entering default judgment and finding in personam jurisdiction absent a hearing*

This Court has held unequivocally that

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S. Ct. 841, and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.Ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

Societe Internationale v. Rogers, supra at 209.

Petitioners contend that the following holding of *Societe Internationale v. Rogers, supra* at 212:

> [i]n view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner . . .

is predicated as much upon the foregoing constitutional mandate as upon the issue of the parameters of discretion which the District Court may exercise in conjunction with imposition of *Rule* 37 sanctions.

It cannot be gainsaid, therefore, that the implications of the District's unilateral action in involving *in personem* jurisdiction and entering default judgment have for a broader impact than involving the instant case. The obvious constitutional infirmity in such an action can be perceived *vis-a-vis* the limitations upon *Rule* 37 sanctions.

Petitioners must be given their constitutional safeguards, in the context of *Rule* 37 sanctions and the default judgment must be vacated.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The critical consequences of the case at bar and the constitutional ramifications of the unauthorized imposition of sanctions provided by *Rule* 37, in the absence of any hearing whatsoever and any showing of wilfulness or bad faith in respect of the alleged non-compliance with the orders for discovery, concern not only the litigants but the Bench and Bar.

It is of the utmost importance that this Court make a definitive pronouncement with respect to the constitutional and due process limitations of *Rule* 37 sanctions.

Respectfully submitted,

/s/ Stephen Apollo
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APPENDIX A

(Filed December 27. 1977)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

JOHN E. ENGLISH, et al.,

Plaintiffs,

vs.

HANSON DEVELOPMENT COMPANY, et al.,

Defendants.

MEMORANDUM AND ORDER ON MOTION TO IMPOSE SANCTIONS

Ready for decision is the plaintiffs' motion to impose sanctions for failure to comply with order of the court, filing 145.

On November 28, 1977, an order was entered, filing 134, requiring the defendants to file answers to designated written interrogatories on or before December 5, 1977. No such filing has been made to the present day, and no motion has been made for an enlargement of time in which to comply with the order.

Sanctions under Rule 37(b) of the Federal Rules of Civil Procedure are therefore appropriate.

It appears to the court that the unresolved issues to which the interrogatories went are those designated in Exhibit C of the order on pretrial conference, filing 152, as:

"1. Personal jurisdiction on The Hanson Development Company, a Delaware corporation.

(a) Was The Hanson Development Company, a Delaware corporation doing business in Nebraska?

(b) Was the involvement of The Hanson Development Company substantial enough to give this court jurisdiction over this defendant?"

Those questions will now stand as answered in the affirmative, and personal jurisdiction over The Hanson Development Company, a Delaware corporation, will now be deemed admitted and established and the issue of personal jurisdiction waived by that defendant.

It may be that the interrogatories are relevant to other issues described in the order on pretrial conference. If so, the plaintiffs may make a showing by brief or otherwise pointing out what other issues, and consideration will be given to imposition of further sanctions.

IT IS THEREFORE ORDERED:

1. That the motion to impose sanctions for failure to comply with order of the court, filing 145 is granted to the extent that it hereby is determined: That the defendant The Hanson Development Company, a Delaware corporation, was doing business in Nebraska and its involvement was substantial enough to give this court jurisdiction over that defendant; that personal jurisdiction over the defendant The Hanson Development Company, a Delaware corporation, is deemed admitted and established and the issue of personal jurisdiction over the defendant is waived by that defendant;

2. That the defendants The Hanson Development Companies shall pay within fifteen days of the date of this order to the plaintiffs' counsel the amount of $100.00 as the expense of obtaining this order; and

3. That because The Hanson Development Company, a Delaware corporation, is now known as 21st Phoenix Corp., wherever in this order there is reference to The Hanson Development Company, a Delaware corporation, it is applicable to 21st Phoenix Corp.

Dated December 27, 1977.

BY THE COURT

/s/ Warren K. Urbom
WARREN K. URBOM
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1221

John E. English and Francis Dorenbach, Personal Representative of the Estate of Mary E. English, Deceased,

Appellees,

vs.

21st Phoenix Corporation and Hanson Development Company, a New Jersey corporation,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Submitted: October 19, 1978

Filed: January 10, 1979

Before GIBSON, Chief Judge, BRIGHT and STEPHENSON, Circuit Judges.

GIBSON, Chief Judge.

Appellants, the Hanson Development Company, a Delaware corporation,[1] and the Hanson Development Company, a New Jersey corporation, appeal from entry of summary judgment in the amount of $670,000 in favor of

1. During the course of litigation the Hanson Development Company, a Delaware corporation, changed its name to 21st Phoenix Corporation. For convenience, this party will be referred to as the Delaware corporation.

appellees as beneficiaries of a lease guarantee against appellants as the guarantors. Jurisdiction in the district court was established by diversity of citizenship. 28 U.S.C. §1332. On appeal, the Hanson companies challenge the District Court's[2] jurisdiction and the imposition of various sanctions for their failure to comply with certain discovery orders and contend that the amount of the judgment was excessive.

In 1969, three brothers formed the Delaware corporation for the principal purpose of developing and promoting shopping centers in various states. The Hanson brothers continue to own this corporation as sole stockholders of the JEH Development Company. The New Jersey corporation, carrying the same corporate name, was organized in 1972, and is a wholly-owned subsidiary of the Delaware corporation. This New Jersey corporation shares not only the name, but the business purpose, officers and address of the Delaware corporation. The Hanson brothers also own 70% of S & H Shopping Centers, Inc. (hereinafter referred to as S & H), another corporation formed for the purpose of developing shopping centers that shares the address of the Hanson companies. This latter corporation entered into an agreement with the Delaware corporation whereby in exchange for its providing services as an experienced developer, the Delaware corporation would receive 70% of the profits on any shopping centers developed by S & H.

In 1971, the Hanson brothers became interested in some Nebraska property located in Grand Island. One of the brothers inspected the site and called the owners of the property, Grand Island Mall, Inc., regarding the leasing of the property as a shopping center site. Negotiations resulted in the execution on May 24, 1972, by Grand Island

2. The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

Mall, Inc. and Donald Hanson as vice-president of the Delaware corporation, of an agreement providing for a 99 year lease. The agreement included addenda amending portions of the basic agreement. One amendment provided that the lease would "be entered into by and between Grand Island Mall, Inc. and S & H Shopping Centers, Inc., a Delaware corporation, and guaranteed by The Hanson Development Company, rather than entered into as Hanson Development Company as Tenant." Donald L. Hanson signed both the original agreement and the addenda as vice-president of the Delaware corporation.

On October 18, 1972, Grand Island Mall, Inc. leased its property to EES Grand Island Associates Ltd. This limited partnership assigned all its interest in the lease to S & H, its general partner. Thereafter, S & H mortgaged the property to United Jersey Mortgage Company in order to finance a loan of $3,200,000 for the development of the shopping center, and in 1973 began constructing improvements and leasing space to retail businesses. This project became known as the Grand Island Mall and was one of three shopping centers started by S & H in Nebraska in 1972.

In accordance with the terms of its agreement with S & H, the Delaware corporation provided services to aid the development of these Nebraska projects. It maintained a regional office in Kansas City, Missouri, and personnel from this office traveled to Nebraska to inspect construction, review specifications, meet with tenants, and generally facilitate rapid and orderly progress. Another office opened in Omaha, Nebraska, and the Delaware corporation paid the salaries of the four employees working out of this office. These employees primarily handled contacting prospective tenants, leasing space and coordinating construction for these tenants. As consideration for the services rendered

on behalf of the three shopping centers in Nebraska, the Delaware corporation received in excess of $1.7 million. In addition to providing services, the Delaware corporation in the course of its business of promoting and developing shopping centers guaranteed the performance of some of the agreements and undertakings of S & H with regard to these projects. The Hanson Development Company guaranteed the full performance of the lease of the Grand Island property, including the obligation of the lessee to make mortgage payments on the mortgage in favor of the United Jersey Mortgage Company. This guarantee was signed by John F. Hanson, president of the Hanson Development Company, and imprinted with the seal of the Delaware corporation. On August 20, 1974, John E. English and his sister, Mary E. English, traded property with Grand Island Mall, Inc., and thereby succeeded to all interests in the Grand Island property previously held by Grand Island Mall, Inc. Subsequently, S & H defaulted on the mortgage payments. In an action in the United States District Court for the District of Nebraska, with the Englishes and the Hanson company as parties defendant, the United Jersey Mortgage Company obtained a judgment of foreclosure as a result of which the land was sold at forced sale.

On October 12, 1976, the Englishes filed the complaint for damages in the present action, naming the Delaware corporation and S & H as defendants. Neither defendant responded, and a default judgment was entered against both. The Delaware corporation later entered an appearance and the District Court granted its motion to set aside entry of the default. In the course of discovery, the Englishes learned of the existence of the New Jersey corporation with the identical name and address, and amended the complaint to add it as a party defendant.

Discovery commenced immediately upon filing of the complaint, when plaintiffs-appellees served upon the Delaware corporation interrogatories and a request for production and copying of documents, but discovery did not proceed unimpeded. Lack of cooperation, inadequate responses, and dilatoriness on the part of the appellants hampered the orderly progression of discovery. Numerous times, the District Court issued orders to compel discovery, and also granted many of the appellants' motions for extensions of time. Finally, after appellants' continued failure to comply with court-ordered deadlines for discovery, the District Court imposed sanctions designed to establish as admitted those facts which appellees sought to establish by the discovery denied them. Thereafter, the District Court granted appellees' motion for summary judgment on the issue of liability and the issue of damages was tried to the court. Appellants contest the summary judgment on the basis that the District Court abused its discretion by its imposition of sanctions, and that sanctions cannot be utilized to establish jurisdictional facts. It also contests the amount of damages awarded.

Pursuant to Fed. R. Civ. P. 37(b)(2)(A),[3] on December 27, 1978, the District Court entered an order establishing that the Delaware corporation was doing business in Nebraska and its involvement was substantial enough to

3. Fed. R. Civ. P. 37(b)(2)(A) states:

2. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[.]

give the court personal jurisdiction. The history of the discovery proceedings leading to this order amply supports the District Court's exercise of discretion.

On January 18, 1977, appellees moved to compel answers to the first set of interrogatories. In response, the court ordered that answers or objections be made by February 11, 1977. On that date appellants moved for an extension of time until the 14th of February. The court granted this extension, but received nothing on the 14th. Instead, on February 22, appellants filed vague and unresponsive answers together with a motion for an order granting an extension of time for the filing of the answers until the 22nd. Thereafter the parties entered into a stipulation that provided that the Delaware corporation would correct improper answers and properly frame its objections to interrogatories by May 23, 1977, and would answer fully and completely all interrogatories not objected to by June 9, 1977. On May 18, 1977, the court approved this stipulation and ordered compliance therewith. Appellant practically ignored the deadlines established by the stipulation, and on May 25 filed three corrected but unsworn answers and objections to eight of the interrogatories. On June 23, 1977, appellees moved for an order to show cause why the defendants should not be held in contempt of court because of their failure to comply with the orders, rules and procedures of the court and their failure to provide discovery. On August 10, 1977, appellees moved for an order treating the issue of personal jurisdiction as established for the reason that appellants were deliberately avoiding and delaying discovery of the facts pertaining to this issue by responding to interrogatories in an unresponsive, inconsistent, evasive, and incomplete manner. On August 17, the court denied

appellees' motions and made further orders providing for the progression of discovery. On August 19, 1977, appellees again moved to compel answers to the first set of interrogatories. The court responded in a detailed memorandum and order requiring answers to specific questions and clarification of specific discrepancies to be made by September 6, 1977. On September 14, 1977, appellants filed a few answers. Appellees filed a second set of interrogatories on October 6, 1977. The Delaware corporation again ignored the schedule for discovery set out in Rule 33(a), Fed. R. Civ. P., and appellees on November 16, 1977, moved to compel answers. In turn, the Delaware corporation moved for a protective order. Following a hearing on these motions, on November 28, 1977, the court ordered the Delaware corporation to answer certain questions by December 5, 1977. On December 13, 1977, appellees moved to impose sanctions for failure to comply with the November 28 order. Finally, on December 27, the court imposed the sanction of establishing personal jurisdiction.[4]

Fed. R. Civ. P. 37(b) provides comprehensively for sanctions for failure to obey discovery orders, and the imposition of these sanctions should not be reversed unless there has been an abuse of discretion. *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 239 (8th Cir. 1977); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 993-94 (8th Cir. 1975); 4A MOORE'S FEDERAL PRACTICE ¶37.08 at 37-112-13 (2d ed. 1978). The court below carefully followed the procedures outlined in *Rule* 37. Exercising its discretion, it granted extensions of time for discovery, held hearings on discovery motions, entered orders to compel discovery, and finally, after the continued failure of appellants to respect discovery orders, it imposed a sanction drawn narrowly to establish as admitted the fact that the Delaware corporation had contacts with Nebraska sufficient to support in personam jurisdiction.

The imposition of this sanction did not deny the Delaware corporation its fifth amendment rights to due process.[5] In accord with the sound policy favoring the use of less severe and harsh sanctions than dismissal or default, the District Court carefully tailored its order to address the specific information sought by discovery.[6] *See Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977).

The proceedings leading to the imposition of the sanction establishing the Delaware corporation as the guarantor were substantially the same as that leading to the sanction

4. Although sanctions were not applied to the New Jersey corporation, the defendants in effect confess judgment against that corporation and claim that the New Jersey corporation was the guarantor instead of the Delaware corporation. The New Jersey corporation apparently has no assets. This acknowledgment serves as a basis for establishing in personam jurisdiction over the New Jersey corporation in showing participatory activities by the corporations in financing and constructing this shopping center in Nebraska.

5. Appellants' argument that the District Court lacked jurisdiction to enter the sanction order is equally meritless. Unlike subject matter jurisdiction, in personam jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver. *United States v. Gajewski*, 419 F.2d 1088, 1091 (8th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970); 2 MOORE'S FEDERAL PRACTICE ¶ 4.02[3] at R-48 (2d ed. 1978). The same principles give jurisdiction to the District Court to enter a sanction order. It is established beyond cavil that a court has jurisdiction to determine jurisdiction, and a party cannot hope to avoid the jurisdiction of a court by concealing evidence regarding its activities in the forum state.

6. We also note that the exercise of *in personam* jurisdiction over the Delaware corporation does not offend traditional notions of fair play and substantial justice. The complete record below reveals that the Delaware corporation had sufficient minimum contacts with Nebraska. *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945). It invoked the benefits and protections of Nebraska law by reason of its activities regarding the shopping centers, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and entered into a contract with Grand Island Mall, Inc. regarding lease of property in Nebraska that obviously had a "substantial connection" with the forum state. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). These contacts with Nebraska are substantial and intimately related to this cause of action instituted by residents of Nebraska. The exercise of jurisdiction was entirely consistent with the requirements of due process. *See Caesar's World, Inc. v. Spencer Foods, Inc.*, 498 F.2d 1176, 1180-81 (8th Cir. 1974).

regarding jurisdiction. Appellants obstructed the discovery of certain documents by the use of dilatory and contumacious tactics. Appellees sought these documents to prove that the Delaware corporation and not the New Jersey corporation made the guarantee.[7] The District Court repeatedly ordered the production of these documents.[8] Finally, after holding a hearing and finding that no good cause was shown for the failure to produce the documents as ordered, it imposed the sanction. The District Court did not abuse its discretion.

Appellants also challenge the amount of the damages awarded. They contend that the damages assessed against

7. The appellees claimed that both corporations made the guarantee but that if only one had made it then the Delaware corporation was the guarantor. During the course of discovery, appellants took the position that the New Jersey corporation had made the guarantee. Since the New Jersey corporation was a financially insecure, wholly-owned subsidiary of the Delaware corporation, this conduct reveals a situation fraught with possibilities for fraudulent schemes. These two corporations, with the same name, officers and address, one having substantial assets and the other essentially bankrupt, could easily be confused by persons dealing with them. It appears that the owners and officers attempted fraudulently to manage this confusion to their personal benefit. They cannot now argue that the finding against the Delaware corporation renders improper a judgment against the New Jersey corporation for which they confessed an obligation.

8. On November 7, 1977, the District Court clearly informed appellants of the consequences of non-compliance. Its order stated in part:

> If the defendants, The Hanson Development Company, a New Jersey corporation, and The Hanson Development Company, a Delaware corporation fail to deliver the items mentioned in subparagraph A of this order within the time ordered, an order will be entered, absent a showing of good cause to the contrary, that the guarantees identified as exhibits C, D, and N, which are attached to the first amended complaint, are the guarantees of the defendant The Hanson Development Company, a Delaware corporation, and that fact shall be taken to be established for the purpose of this action in accordance with the claims of the plaintiffs. In addition to the above court order the following facts were shown:
>
> (1) The guarantee bore the corporate seal of the Delaware corporation.
>
> (2) The officers signing the guarantee were officers of the Delaware corporation.
>
> (3) The Delaware corporation had an interest in S & H Shopping Centers, Inc. as referred to in the guarantee.
>
> (4) The financial statement furnished in connection with the guarantee was that of the Delaware corporation.

the guarantor must be limited to the amount of the default judgment against the principal, S & H, and that the evidence does not support even that amount. The joint and several default judgment rendered against S & H and The Hanson Development Company was in the sum of $593,-802. The Delaware corporation chose to have this judgment against it set aside and go to trial. At trial, expert testimony from a real estate appraiser established that appellees suffered a loss of $670,000 due to the default of S & H on the mortgage payments. The record clearly supports the District Court's judgment for damages in this amount.

We have reviewed the remaining arguments of appellants and find them to be without merit. The District Court's findings of fact are not clearly erroneous and it applied correct principles of law.

All motions are overruled except that all costs shall be taxed against the appellants.

Judgment affirmed.

A TRUE COPY.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1978

No. 78-1221

JOHN E. ENGLISH, et al.,

Appellees,

vs.

21st PHOENIX CORPORATION, et al.,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 12, 1979.

APPENDIX D

EXTRACT FROM MINUTES OF THE DISTRICT COURT

(Page 154) The Court: Mr. Bailey.

Mr. Feldshuh: May it please the Court. May I interrupt for one moment?

The Court: Yes, you may.

Mr. Feldshuh: Just for the clarification of the record, may I at this time, your Honor, may your Honor's rulings apropros to the denial of our motions for reconsideration of your Honor's findings with respect to the guarantying, or the guarantee of the Delaware Corporation, and more particularly, your Honor, with respect to your Honor's findings of personal jurisdiction over the Defendant, Delaware.

As to the latter, sir, I respectfully request the permission of the Court to make at this time an offer of proof with regard to the issue of personal jurisdiction over the Defendant, Delaware, in that, may it please the Court, if we had the occasion so to do, we would offer to prove that the total services performed in accordance with the depositions that were taken of witnesses at the behest of plaintiff would establish that the sum total of the contacts that Delaware had with the State of Nebraska were contacts which involved inspection of work actually carried on by the Law Company when it built the Grand Island Mall.

(Page 155) Mr. Feldshuh: The Law Company being the general contractor on the job; the inspections being solely for the purpose of confirming the draw-downs that the Law Company was requisitioning under its construction contract with the Defendant S & H.

The other area with regards to that situation, your Honor, would be to show that the regional office of Delaware was—Hanson, Delaware, was in the State of Kansas; that originally it was in Topeka, Kansas; and that thereafter my recollection is that it went either to Kansas City or Wichita —but I believe it was Kansas City, Kansas, or Missouri; but certainly not to the State of Nebraska.

I respectfully submit, may it please the Court, as a matter of law, those contracts would not establish personal jurisdiction over the Defendant Delaware. And so we most respectfully, sir, just for the purposes of this record, that would constitute our offers of proof.

The Court: Very well. Mr. Bailey.

Mr. Bailey: I don't want to get into the area of having to make an offer contrarywise but let me make a statement as to what we did discover during the depositions, which was difficult of discovery.

(Page 156) The Court: Very well.

Mr. Bailey: That is, that the Hanson Development Company had a joint enterprise, so to speak. T10 had a 70 percent interest in S & H Shopping Centers. They had three shopping centers under construction in the State of Nebraska. They had South Town; they had Grand Island; and they had one other shopping center in Omaha. They had an office in Omaha in which they employed a Sharon Blair and one other individual for more than one year. Payment on W-2 forms indicated that they were payees. These individuals were employees working out of the Omaha office, of the Hanson Development Company of Delaware, attempting to make leases and supervising—supervisory work in relation to these three shopping centers.

Our evidence further indicated that in fact, that the personnel from the Kansas City area did, in fact, make periodic and regular inspections to the State of Nebraska, to the three shopping centers involved to determine whether or not the work was, in fact, whether or not the work was being performed in accordance with contractual relationships between the contractor and S & H Shopping Centers, Inc. The (Page 157) Mr. Bailey: evidence was overwhelming that they were doing business but, in any event, I wanted to make that part of the record as a resistance to the showing; but in any event, we are prejudiced at this time to gather again the evidence at this late date; and we object to it strenuously, continually being at a late time.

And we would request the Court to overrule that request of the Hanson Development Company.

The Court: Well, I interpret the offer as being simply made so that the record will include it. My ruling stands. It is not based upon the offer as made, nor on the basis of Mr. Bailey's response to it. It was made in connection with the discovery and lack of abiding by the orders of the Court touching the subject of discovery; and I simply stand on my ruling as earlier made.

Mr. Feldshuh: Your Honor, just for clarification, of course, your Honor, I agree with your Honor. I didn't mean to infer anything to the contrary. I am merely taking a position as a matter of law, as I do not, and most respectfully, sir, I submit to you that under the Rules of Civil Procedure, sanctions that were envisioned by those particular rules did not umbrella that kind of foreclosure (Page 158) Mr. Feldshuh: that existed here; and I merely to that extent, your Honor, bring that to your Honor's attention.

The Court: I know that, but it is simply a matter of the law, that at some point there has to be a decision about what the law is, and I may be mistaken.

Mr. Feldshuh: Right.

The Court: If that's true, let the Eighth Circuit make that decision.

All right. What else do you want, Mr. Bailey? Do you want to make argument now on the damage issue?

Mr. Bailey: Your Honor, I think we have covered the argument of damages in briefs and the proposed propositions of law we have furnished to the Court. Our argument goes primarily to when those damages are to be ascertained. We feel that the damages under the law and under the facts as the guarantees were given were continuing guarantees, and that they continue right up